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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,) No. 3:22-cr-00084-SI
Plaintiff,) MOTION FOR RULE 17(C)
vs.) SUBPOENA
TONY KLEIN)
Defendant.)

Pursuant to Fed. R. Cr. P. 17(c), defendant, Tony Klein, through counsel Matthew McHenry, moves the Court for an order allowing him to serve a subpoena duces tecum on the Columbia County Sheriff.

Mr. Klein also applies for an order that the costs and fees incurred be paid as provided by 28 C.F.R. §§ 21.1 – 21.6 because he is indigent.

As set forth below, the records sought via the subpoena are material to key, disputed issues and necessary for trial preparation and granting Mr. Klein a fair trial without interruptions or unnecessary delays.

I. PROCEDURAL HISTORY

Mr. Klein is defending against a multi-count indictment under 18 U.S.C. §§ 242 and 1623, arising from conduct alleged to have occurred while he was working as a nurse at the Coffee Creek Correctional Facility, an Oregon Department of Corrections facility in Wilsonville, Oregon, in late 2016 through 2017. More specifically, he faces multiple counts of deprivation of civil rights for allegedly engaging in unlawful sexual misconduct with incarcerated individuals during the relevant time period. He further faces 4 counts of perjury for allegedly testifying falsely about the accusations during a subsequent civil case brought by several incarcerated individuals against the Oregon Department of Corrections and Mr. Klein. The combined charges carry a potential life sentence.

Trial has begun. As is customary, the Court has ordered that all witnesses be excluded from the trial and further ordered the parties to ensure witnesses are following the letter and spirit of the Court's exclusion order. Government witness Melanie Gould (AV13) testified before the jury on July

11, 2023. The government has indicated it intends to call Lindsey Criss (AV3) before it rests its case.

II. PROPOSED SUBPOENAS DUCES TECUM

The proposed subpoena duces tecum sets forth the specifically enumerated items sought by the defense prior to trial. All of the items sought are either known to exist. All are highly relevant to Mr. Klein's defense and cannot be obtained through other means.

On July 16, 2023, undersigned counsel received communication from the government that government witness Melanie Gould (AV13), who testified before the jury on July 11, 2023, spoke on the telephone with potential government witness Lindsey Criss (AV3) about the ongoing trial and their status as witnesses. This conversation took place after Ms. Gould testified. Ms. Criss has not yet testified.

Ms. Criss is currently housed at the Columbia County Jail in St. Helens, Oregon. All non-legal calls into and out of the Columbia County Jail are recorded.

The items sought—recordings of the phone call between government witnesses made mid-trial, and others Ms. Criss has made since her arrival in Columbia County at the beginning of June—contain statements the defense

is entitled to under *Brady* and *Giglio*, and also constitute Jencks Act material.

III. LEGAL DISCUSSION

Generally speaking, to obtain third party discovery prior to trial, the defendant must show: (1) the contemplated discovery is evidentiary and relevant; (2) it is not otherwise procurable in advance of trial through other means; (3) the defendant cannot prepare for trial without such discovery and withholding it may result in unreasonable delays; and (4) the application is made in good faith and is not intended as a general “fishing expedition.”

United States v. Nixon, 418 U.S. 683, 701 (1974).

The proposed subpoena is in direct response to information provided by the United States and targets specific items for production. The request seeks a narrow set of items and targets a specific set of items, limited by name and date range. The request targets records for government fact witnesses. It is contemplated as part of a strategy to bring exculpatory evidence before the jury, primarily through impeachment of testifying witnesses for bias and interest.

Consistent with Rule 17 (c), the subpoena will direct the custodian of records to provide the records to this Court, but in care of undersigned

counsel. Undersigned counsel will alert this Court when responsive documents have been received, or will move to enforce compliance.

Respectfully Submitted this 16th day of July, 2023:

/s/ Matthew G. McHenry
Matthew G. McHenry
Counsel for Tony Klein

/s/ Amanda Alvarez Thibeault
Amanda Alvarez Thibeault
Counsel for Tony Klein